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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91249427
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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

**EVOLUTIONARY GUIDANCE
MEDIA R&D INC.,**

Opposer,

v.

**CYBERMAN SECURITY, LLC AKA THE
CYBERHERO ADVENTURES:
DEFENDERS OF THE DIGITAL
UNIVERSE,**

Applicant.

Opposition No. 91249427

Serial No. 88219305

**Mark: THE CYBERHERO ADVENTURES
DEFENDERS OF THE DIGITAL UNIVERSE**

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**OPPOSER EVOLUTIONARY GUIDANCE MEDIA R&D INC.'S,
TRIAL BRIEF**

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I. INTRODUCTION

Evolutionary Guidance Media R&D, Inc. (“EGM” or “Opposer”) was started by two sisters with the goal of using technology to promote transformative narratives. 14 TTABVUE Exh. EGM26. Since 2008, EGM has worked to provide interactive educational, entertainment, and social networking services through providing web-based games, toys and other materials that use storytelling, animation, and cartoon characters to help people, animals, or the environment. 1 TTABVUE 2 (¶3). EGM has advertised, marketed, and promoted its interactive educational, entertainment, and social networking services, as well as its electronic wearable device and game materials (referred to hereinafter collectively as “EGM’s Goods and Services”) under its registered CYBERHERO LEAGUE and common law CYBERHERO and CYBERHERO LEAGUE ADVENTURE SERIES marks (collectively, “EGM’s CYBERHERO LEAGUE and CYBERHERO marks”). 1 TTABVUE 2 (¶3). EGM has used its registered CYBERHERO LEAGUE mark in commerce continuously since February 2011 and its common law marks during the same time period. 1 TTABVUE 3 (¶4). As a result, EGM has amassed an extraordinary level of goodwill and an exceptional reputation associated with these Marks.

Applicant Cyberman Security, LLC AKA The CyberHero Adventures: Defenders of the Digital Universe (“Applicant” or “Cyberman”) applied to register a similar mark – THE CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE (“Applicant’s CYBERHERO mark”) – for comic books based on use in commerce through U.S. Trademark Application Ser. No. 88/219,305 (the “305 Application”). 1 TTABVUE 1 (¶1). Applicant’s CYBERHERO mark is likely to cause confusion with EGM’s CYBERHERO LEAGUE and CYBERHERO marks. It will also dilute the distinctive quality and strength of EGM’s Marks so much that the established selling power and value of EGM’s CYBERHERO LEAGUE and CYBERHERO marks, and the ability of EGM’s CYBERHERO LEAGUE and CYBERHERO marks to function as exclusive indicators of EGM’s Goods and Services, will be whittled away.

II. STATEMENT OF ISSUES

The issue before the Board are as follows:

1. Whether, pursuant to 15 U.S.C. §§ 1052(d) and 1063(a), registration of the '305 Application for THE CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE mark should be refused due to a likelihood of confusion with EGM's similar CYBERHERO LEAGUE and CYBERHERO marks.
2. Whether, pursuant to 15 U.S.C. §§ 1052(d) and 1063(a), EGM's application for registration for CYBERHERO mark should be refused due to a likelihood of confusion with Applicant's THE CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE mark.

III. THE DESCRIPTION OF RECORD

A. Opposer EGM's Evidence

EGM has submitted evidence establishing its own standing, the use and widespread exposure of EGM's CYBERHERO LEAGUE and CYBERHERO marks, and the similarity of EGM's Goods and Services with the recited comic book goods of Applicant.

EGM's evidence is summarized below:

<i>Form of Evidence</i>	<i>Description of Evidence</i>
Opposer's Notice of Reliance Under Rule 2.122(d)(2) – See 13 TTABVUE Exh. EGM1	Documentary evidence of the (i) registration, assignment and file history for EGM's CYBERHERO LEAGUE mark and (ii) the incontestability of EGM's CYBERHERO LEAGUE
Opposer's Notice of Reliance Under Rule 2.122(e) – See 13 TTABVUE Exhs. EGM2 – EGM25	Documentary evidence of trademark official records from the Trademark Status & Document Retrieval database showing the relatedness of the good of Applicant and EGM's Goods and Services.

Opposer's Declaration of Dana Klisanin – See 14 TTABVUE Exh. EGM26	Declaration testimony of Dana Klisanin with documentary evidence of webpages showing: (i) widespread user of EGM's CYBERHERO LEAGUE and CYBERHERO marks as it relates to EGM's Goods and Services
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B. Applicant Cyberman's Evidence

Applicant chose not to submit any evidence during its trial period.

IV. FACTUAL BACKGROUND

A. EGM's CYBERHERO LEAGUE and CYBERHERO Marks

Since 2011, EGM has expended (and continues to expend) extensive resources on advertising, marketing, and promoting its Goods and Services under its CYBERHERO LEAGUE and CYBERHERO marks. 14 TTABVUE 2 (¶ 3). EGM owns U.S. Trademark Registration No. 4197051 for the mark CYBERHERO LEAGUE ("EGM Registration"). 1 TTABVUE 2 (¶ 3); 13 TTABVUE Exh. EGM1.

The CYBERHERO LEAGUE mark is valid, subsisting, and "incontestable" within the meaning of 15 U.S.C. § 1065. 1 TTABVUE 3 (¶ 5). Accordingly, the registration constitutes evidence of (i) the CYBERHERO LEAGUE mark's validity, (ii) EGM's ownership of the CYBERHERO LEAGUE mark, and (iii) EGM's exclusive rights to the CYBERHERO LEAGUE mark in connection with EGM's Services. *Id.*

B. Applicant's Infringing THE CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE Mark

On December 6, 2018, Applicant filed the '305 Application seeking registration of the word mark THE CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE in Int. Cls. 16 for comic books. 1 TTABVUE 1-2 (¶1-2). Applicant uses its THE CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE mark to promote its comic books and other materials including storytelling, animation, cartoon drawings, and cartoon characters to provide empowering, engaging, and entertaining stories. 1 TTABVUE 3 (¶6, 13). In effect, the applied-for THE CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE mark will be used in

the same channels of trade and appeal to the same client base – children – as EGM’s CYBERHERO LEAGUE and CYBERHERO marks.

C. EGM’s Use of its CYBERHERO LEAGUE and CYBERHERO Marks

As established by the EGM Registration, EGM began using CYBERHERO LEAGUE in United States commerce almost a decade before Applicant filed the ’305 Application. 13 TTABVUE Exh. EGM1. Subsequently, EGM adopted and began to use its CYBERHERO and CYBERHERO LEAGUE ADVENTURES. 14 TTABVUE Exh. EGM26. EGM has been continuously using its CYBERHERO LEAGUE and CYBERHERO marks to promote its Goods and Services, for almost a decade.

EGM’s CYBERHERO LEAGUE was incontestable before Applicant filed its application for its CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE mark. Consequently, consumers and members of the general public are likely to associate the goods and services offered under Applicant’s applied-for CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE mark with EGM’s CYBERHERO LEAGUE and CYBERHERO marks and/or the Goods and Services that EGM offers thereunder.

On February 7, 2019, EGM filed a new trademark application for CYBERHERO for its Goods and Services (the “133 Application”). On February 3, 2020, Applicant filed an opposition for the ‘133 Application on the grounds of likelihood of confusion with Applicant’s THE CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE.

And, by virtue of the decade of use, each of EGM’s CYBERHERO LEAGUE and CYBERHERO marks has become increasingly famous, well known, and distinctive.

V. ARGUMENT

At issue in this proceeding is whether Applicant, the junior user of the mark at issue, can register CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE, to cover goods and services supplemental to EGM’s Goods and Services, despite EGM’s use and registration of EGM’s

CYBERHERO LEAGUE and CYBERHERO marks as evident from EGM's extant registration, evidence of use, and evidence of common law use.

The answer is a resounding NO.

Consumers are very likely to confuse Applicant's goods and services with EGM's based on EGM's longstanding use of its CYBERHERO LEAGUE and CYBERHERO marks. Further, any use by Applicant of the applied-for CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE mark will dilute the strength, distinctiveness, and goodwill that EGM has amassed over the last 10 years.

A. EGM has the Requisite Standing and Priority to Oppose THE CYBERHERO ADVENTURES Mark

EGM has unarguably met its burden of proof for both standing and priority. *See Ritchie v. Simpson*, 50 U.S.P.Q.2d 1023, 1029 (Fed. Cir. 1999) ("Mr. Ritchie's pleadings demonstrate the required 'real interest' in the outcome of the opposition, and that his 'belief of damage' has a reasonable basis in fact.").

First, under the Lanham Act, an opposition or a petition to cancel may be filed by "[a]ny person who believes that he would be damaged by the registration of a mark." 15 U.S.C. § 1064. This threshold standing requirement is satisfied as long as the opposer or petitioner possesses a "real interest" in the proceeding. *Compuclean Mktg. & Design v. Berkshire Prods., Inc.*, 1 U.S.P.Q.2d 1323 at *2 (T.T.A.B. 1986) (citations omitted). Here, EGM has established its standing by making of record its pleaded registrations for its CYBERHERO LEAGUE and CYBERHERO marks, which gives it a real and substantial interest in the proceeding and reasonable belief of damage from registration of Applicant's CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE mark, granted that its likelihood of confusion has merit. *See Cunningham v. Laser Golf Corp.*, 55 U.S.P.Q.2d 1842, 1844 (Fed. Cir. 2000) ("Laser Golf owns two prior registrations. These registrations and the products sold under the mark they register suffice to establish Laser Golf's direct commercial interest and its standing to petition for cancellation of Cunningham's LASERSWING mark.").

EGM has continuously used its CYBERHERO LEAGUE and CYBERHERO marks in commerce since at least as early as 2010 and owns EGM's Registration for the CYBERHERO LEAGUE mark, which was registered well before the filing date of the '305 Application. *See* 13 TTABVUE Exh. EGM1. This registration is prima facie evidence of the validity of the respective mark and of EGM's ownership and exclusive right to use the marks in connection with its services. 15 U.S.C. § 1057(b). EGM believes that registration of Applicant's nearly identical CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE mark for closely-related complementary services will cause consumer confusion and will dilute and tarnish EGM's CYBERHERO LEAGUE and CYBERHERO marks. 1 TTABVUE (Notice of Opposition). EGM, therefore, has standing to challenge the registration of the '305 Application. 15 U.S.C. § 1052(d).

Second, to establish priority, EGM must show proprietary rights in its CYBERHERO LEAGUE and CYBERHERO marks arising from "a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any use sufficient to establish proprietary rights." *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1162, 64 U.S.P.Q.2d 1375, 1378 (Fed. Cir. 2002); 15 U.S.C. § 1052(d) (a mark may be refused registration if it resembles a mark registered or previously used). Once an opposer proves that it owns a prior registration for its pleaded mark, priority is not a concern. *L'Oreal S.A. v. Marcon*, 10 U.S.P.Q.2d 1434, 1436 n.7 (T.T.A.B. 2012) ("[T]here can be no priority dispute when an opposer properly introduces its registrations into the record, and the Applicant fails to file a counterclaim to cancel them.").

Here, EGM's earliest registration for its CYBERHERO LEAGUE mark – Reg. No. 4,197,051 – issued on August 28, 2012, six years prior to filing of Applicant's '305 Application. Further, EGM has established common law rights in the CYBERHERO LEAGUE and CYBERHERO Marks since at least as early as 2010, well before Applicant used or applied for registration of its CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE mark. 13 TTABVUE Exh. EGM1.

Effectively, EGM has established proprietary rights in its CYBERHERO LEAGUE and CYBERHERO marks for its Goods and Services, based on its continuous use in commerce, which preceded Applicant's use of the applied-for CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE mark. *See Otto Roth & Co. v. Universal Food Corp.*, 209 U.S.P.Q. 40, 43 (C.C.P.A. 1981) ("the opposer must prove he has proprietary rights in the term he relies upon to demonstrate likelihood of confusion as to source, whether by ownership of a registration, prior use of a technical 'trademark,' prior use in advertising, prior use as a trade name, or whatever other type of use may have developed a trade identity."); *Larami Corp. v. Talk to Me Programs Inc.*, 36 U.S.P.Q.2d 1840, 1845 (T.T.A.B. 1999).

To date, Applicant has neither claimed nor provided evidence of an earlier use. Thus, EGM has unequivocally demonstrated priority. *Herbko*, 64 U.S.P.Q.2d at 1378.

B. Applicant's CYBERHERO ADVENTURES Mark is Likely to Cause Confusion with EGM's CYBERHERO LEAGUE and CYBERHERO Marks

Without question, the record in this proceeding proves that CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE mark is confusingly similar to each of EGM's CYBERHERO LEAGUE and CYBERHERO marks.

Pursuant to the Lanham Act, a mark may not be registered if it is likely to cause confusion, mistake, or deception based on a registered mark previously used in the United States by another and not abandoned. 15 U.S.C. §1052(d). In determining whether there is a likelihood of confusion, the Board focuses on whether the purchasing public would mistakenly assume that Applicant's services originate from the same source as, or are associated with EGM's Goods and Services. *See In re Majestic Distilling Co.*, 315 F.3d 1311, 1314 (Fed. Cir. 2003). This determination is made on a case-by-case basis by applying the relevant factors determined by the Court in *In re E.I. DuPont de Nemours & Co.*, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973) (the "*DuPont* factors"):

1. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

2. The similarity or dissimilarity of and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.
3. The similarity or dissimilarity of established, likely-to-continue trade channels.
4. The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing.
5. The fame of the prior mark (sales, advertising, length of use).
6. The number and nature of similar marks in use on similar goods.
7. The nature and extent of any actual confusion.
8. The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.
9. The variety of goods on which a mark is or is not used (house mark, "family" mark, product mark).
10. The market interface between Applicant and the owner of a prior mark:
 - (a) a mere "consent" to register or use.
 - (b) agreement provisions designed to preclude confusion, i.e. limitations on continued use of the marks by each party.
 - (c) assignment of mark, application, registration and good will of the related business.
 - (d) laches and estoppel attributable to owner of prior mark and indicative of lack of confusion.
11. The extent to which Applicant has a right to exclude others from use of its mark on its goods.
12. The extent of potential confusion, i.e., whether *de minimis* or substantial.
13. Any other established fact probative of the effect of use.

Id. at 567. The Board need not consider all *DuPont* factors, see *Han Beauty, Inc. v. Albert-Culver Co.*, 57 U.S.P.Q.2d 1557, 1559 (Fed. Cir. 2001), but only those that are relevant to the case. Here, the vast majority of

the relevant factors weigh heavily in favor of finding a likelihood of confusion. Even so, if the Board deemed the analysis to leave doubt as to whether confusion is likely, such doubt should always be resolved against the Applicant, as the junior mark holder, and in favor of EGM, the senior mark holder. *See, e.g., In re Shell Oil*, 26 U.S.P.Q.2d 1687, 1691 (Fed. Cir. 1993), *Hewlett-Packard Co. v. Packard Press, Inc.*, 62 U.S.P.Q.2d 1001, 1003 (Fed. Cir. 2002) (“This court resolves doubts about the likelihood of confusion against the newcomer because the newcomer has the opportunity and obligation to avoid confusion with existing marks.”).

1. Applicant’s CYBERHERO ADVENTURES Mark is Strikingly Similar to EGM’s CYBERHERO LEAGUE and CYBERHERO Marks

The most important factor in the likelihood of confusion analysis is the degree of similarity between the marks at issue. *See In re i.am.symbollic, llc*, 116 U.S.P.Q.2d 1406, 1409 (T.T.A.B. 2015); *aff’d* 866 F.3d 1315 (Fed. Cir. 2017); *see also Federated Foods, Inc. v. Fort Howard Paper Co.*, 192 U.S.P.Q. 24, 29 (C.C.P.A. 1976); *In re Azteca Restaurant Enter., Inc.*, 1999 WL 221655, at *2, 50 U.S.P.Q.2d 1209 (T.T.A.B. 1999). The “touchstone of this factor is consideration of the marks in total.” *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGaA v. New Millennium Sports, S.L.U.*, 116 U.S.P.Q.2d 1129, 1134 (Fed. Cir. 2015).

A key factor in the likelihood of confusion analysis is the degree of similarity between the marks at issue, in terms of appearance, sound, connotation, and commercial impression. *See Recot, Inc. v. Becton*, 54 U.S.P.Q.2d 1894, 1899 (Fed. Cir. 2000). “It is [] well settled that similarity in any one of the elements of sound, appearance or meaning is sufficient to indicate likelihood of confusion.” *In re Mack*, 197 U.S.P.Q. 755, 757 (T.T.A.B. 1977). Here, there is no question that the marks are strikingly similar.

The challenged mark—CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE—utilizes the primary term of EGM’s CYBERHERO LEAGUE Mark—CYBERHERO—with the addition of terms similar in nature to the remainder of EGM’s CYBERHERO LEAGUE mark—LEAGUE. It is hard to imagine greater similarity than when the challenged mark sound and mean essentially the same as the registered mark. This is true even though the challenged mark includes the additional terms “DEFENDERS OF THE DIGITAL UNIVERSE.” An applicant may not use the trademark of another and

avoid the likelihood of confusion simply by adding to the appropriated mark a generic or descriptive term. *See, e.g., Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 110 U.S.P.Q.2d 1157, 1161 (Fed. Cir. 2014) (affirming Board’s holding that “Lion Capital” and “Stone Lion Capital” were likely to be confused); *In re Toshiba Med. Sys. Corp.*, 2009 WL 1896059, at *1, 91 USPQ2d 1266 (T.T.A.B. 2009) (“Vantage Titan” mark for MRI diagnostic equipment held likely to be confused with “Titan” for medical ultrasound device); *accord Cunningham*, 55 U.S.P.Q.2d at 1846 (“this court has noted that the descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion”). Here, “CYBERHERO” is the dominant term and the addition of the descriptive term by the Applicant of “DEFENDERS OF THE DIGITAL UNIVERSE” (as a modifier of “CYBERHERO ADVENTURES”) does not eliminate the likelihood of confusion. *See In re Mighty Leaf Tea*, 94 U.S.P.Q.2d 1257, 1260 (Fed. Cir. 2010) (citation omitted) (holding that the presence of an additional term in a party’s mark “does not necessarily eliminate the likelihood of confusion if some terms are identical”).

The Federal Circuit has explained that “[t]he proper test is ... ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 101 U.S.P.Q.2d 1713, 1721 (Fed. Cir. 2012) (internal citations omitted). In this case, the putative mark CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE creates virtually the same commercial impression as EGM’s CYBERHERO LEAGUE and CYBERHERO marks. Both marks connote groups of individuals devoted to protecting and accomplishing selfless acts, thus making it likely for consumers to mistakenly assume that the goods and services offered by the new mark are associated with or endorsed by the long-standing CYBERHERO LEAGUE and CYBERHERO marks.

In sum, the overall similarity in sound, appearance, meaning, and commercial impression of the marks at issue weighs heavily in favor of finding a likelihood of confusion.

2. EGM's Goods and Services Are Closely Related to Applicant's Goods

The second *DuPont* factor examines the similarity of the goods and services at issue. “It is well settled that the goods do not have to be identical or even competitive in order for confusion to be likely to result from the use of similar marks upon them.” *Kraft, Inc. v. Country Club Food Indus., Inc.*, 1986 WL 83598, at *3, 230 U.S.P.Q. 549, 551 (T.T.A.B. May 27, 1986). Rather, “[i]t is enough that the goods [be] related in some manner and that their character or the circumstances surrounding their marketing [be] such that they would likely be encountered by the same people under circumstances that could give rise to the mistaken belief that the producer was the same for both” *Id.* (citing *In re Int’l Telephone and Telegraph Corp.*, 197 U.S.P.Q. 910 (T.T.A.B. 1978); *Mobay Chemical Co. v. The Standard Oil Co.*, 163 U.S.P.Q. 230 (T.T.A.B. 1969), or that the marks used on those goods (or services) “originate from, or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods.” *Time Warner Entm’t Co. v. Jones*, 65 U.S.P.Q.2d 1650, 1661 (T.T.A.B. 2002) (internal citations omitted).

Goods or services that are complementary or likely to be purchased and used together are deemed to be “related.” *See Joseph Phelps Vineyards, LLC v. Fairmont Holdings LLC*, 122 U.S.P.Q.2d 1733, 1737 (Fed. Cir. 2017) (“relatedness is a broad concept; products may exhibit ‘relatedness’ when they are ‘complementary products sold in the same channels of trade to the same classes of consumers’). Where the goods or services at issue “have complementary uses, and thus are often used together or otherwise purchased by the same purchasers for the same or related purposes, such goods have generally been found to be sufficiently related such that confusion would be likely if they are marketed under the same or similar marks.” *In re Waiwera LLC*, 2015 WL 3430237, at *4 (T.T.A.B. May 15, 2015) (not precedential). *See, e.g., In re Martin's Famous Pastry Shoppe, Inc.*, 223 USPQ 1289, 1290-91 (Fed. Cir. 1984) (the mark MARTIN'S for bread is confusingly similar to the mark MARTIN'S for cheese, in part because the goods are complementary and often used and consumed together); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d at 1272 (holding medical MRI diagnostic apparatus and medical ultrasound devices to be related, based in

part on the fact that such goods have complementary purposes because they may be used by the same medical personnel on the same patients to treat the same disease). The goods and services offered by EGM and by the Applicant are very complementary as EGM's interactive educational and entertainment services are often services provided with comic books, Applicant's goods, or by purveyors of comic books. 1 TTABVUE 4 - 7 (§ 12 - §14), 13 TTABVUE Exhs. EGM2 – EGM25. In addition, the goods and services offered by each are related because they are likely to be encountered by the same individuals as both Applicant and EGM target the same audience. Specifically, Applicant has stated that the mission for the CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE is “to turn complex cybersecurity and tech information into empowering, engaging and entertaining superhero stories.” 1 TTABVUE 6 (§ 13), 2 TTABVUE 2 (§ 13). Similarly, EGM uses its CYBERHERO LEAGUE and CYBERHERO marks “to empower youth by giving them a way to learn about digital technology and use it to tackle global challenges ... to enables youth to learn about and tackle global challenges by blending physical activity, imagination, and digital gameplay.” 14 TTABVUE 2 (§ 3).

Therefore, based on the similarity of the marks, and the complementary relationship of EGM's and the Applicant's goods and services, it is clear that purchasers familiar with EGM's CYBERHERO LEAGUE and CYBERHERO marks would be likely to mistakenly believe, upon encountering Applicant's CYBERHERO ADVENTURES, that the respective goods and services originate from or are associated with or sponsored by the same entity. *See In re Waiwera LLC*, 2015 WL 3430237, at *4 (T.T.A.B. May 15, 2015) (not precedential) (“Based on the identity of the marks and the complementary relationship of the goods of applicant and registrant, we find that purchasers familiar with registrant's non-alcoholic ginger based carbonated soft drinks offered under the mark GINGERELLA would be likely to mistakenly believe, upon encountering applicant's mark GINGERELLA for vodka, gin and rum, that the goods originate from or are associated with or sponsored by the same entity.”).

3. EGM's and Applicants' Goods and Services Travel Through the Same Trade Channels and Target the Same Individuals

Neither EGM's registrations nor applicant's application limit the channels of trade through which their goods or services are marketed or the classes of purchasers targeted. 13 TTABVUE Ex. EGM1. Thus, they are all presumed to move through all the usual trade channels and to all the usual classes of consumers for those goods and services. *Anheuser-Busch v. Innvopak Sys. Pty Ltd.*, 115 U.S.P.Q.2d 1816, 1825 (T.T.A.B. 2015) ("absent any explicit restriction in the application or registration, [the Board] must presume the parties' identified goods ... travel through all normal channels of trade for goods of the type identified, and [the Board] must consider them to be offered and sold to all of the usual customers of such goods"); *Centraz Indus. Inc. v. Spartan Chemical Co.*, 77 U.S.P.Q.2d 1698, 1700 (T.T.A.B. 2006) ("In the absence of any limitations in the parties' identifications of goods, we must presume that the goods move through all reasonable trade channels for such goods to all usual classes of consumers for such goods."); *Genesco, Inc. v. Matz*, 66 U.S.P.Q.2d 1260, 1268-69 (T.T.A.B. 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade."). For example, both EGM and applicant have a web presence and promote their services through their respective websites. 14 TTABVUE 1 - 2 (¶ 2), Ex. EGM26. And, as discussed herein, they both target individuals to empower youths to tackle important subjects (*see supra* V(B)(2)). Because the channels through which EGM and Applicant offer their respective goods and services are the same, as are their customers, the third and fourth *DuPont* factors also weigh in favor of finding a likelihood of confusion.

4. There is No Evidence of Third-Party Use of Similar Marks

The Sixth *DuPont* factor analyzes the number and nature of similar marks in use on

similar goods. *DuPont*, 177 U.S.P.Q. at 567. There is no evidence in the record of any other mark incorporating the term “CYBERHERO” for goods or services that consumers may already associate with EGM. Therefore, the sixth factor also weighs in favor of a finding that confusion is likely.

5. The Existence or Lack of Confusion is Irrelevant

The seventh and eighth *DuPont* factors focus on consumers’ actual confusion or lack of confusion between the marks at issue. Applicant filed its trademark/service mark application and indicated a date of first use of May of 2018. Therefore, at most, Applicant’s mark has been in commerce for about two years, while EGM’s marks have been in use for over 10 years. And, where a junior user is aware of a senior user’s mark and nevertheless selects a similar mark, confusion is more likely to be found “because the newcomer has the opportunity and the obligation to avoid confusion with existing marks.” *Hewlett-Packard Co.*, 62 U.S.P.Q.2d at 1003. Further, it is settled that evidence of actual confusion is not required to establish a likelihood of confusion. *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 218 U.S.P.Q. 390, 396 (Fed. Cir. 1983); *Gillette Can., Inc. v. Ranir Corp.*, 23 U.S.P.Q.2d 1768, 1774 (T.T.A.B. 1992).

Nonetheless, because of the short period during which the Applicant’s and EGM’s goods and services may have overlapped in the marketplace, the existence or lack of actual confusion between the marks is not relevant and should be deemed neutral in the likelihood of confusion analysis¹.

6. Other DuPont Factors Also Favor a Finding of Likelihood of Confusion

a. Variety of goods on which the mark is used (*DuPont* factor #9): EGM uses the CYBERHERO family of marks for a range of goods and services relating to educational gaming experiences, including toys, games, gaming materials and devices. 1 TTABVue 2 (¶ 3). Because consumers are accustomed to seeing those marks on a variety of educational gaming goods and services, it would be reasonable for them to assume, when encountered with CYBERHERO ADVENTURES

¹ In addition, where, as here, any sales activity is relatively recent, the absence of evidence of actual confusion does not weigh against finding likelihood of confusion. *See Cunningham*, 55 U.S.P.Q.2d at 1847 (Fed. Cir. 2000)

DEFENDERS OF THE DIGITAL UNIVERSE that EGM expanded its brand to comic books, or that such comic books are otherwise associated with or sponsored by EGM and its CYBERHERO LEAGUE and CYBERHERO marks. *See Black & Decker Corp. v. Emerson Electric Co.*, 84 U.S.P.Q.2d 1482, 1492-93 (T.T.A.B. 2007) (finding that because opposer had a family of marks that it used for a variety of goods, consumers may well think upon encountering the Applicant's marks that opposer expanded its line of marks, especially because of the similarities between the products at issue).

b. The market interface between the parties (*DuPont* factor #10): There is no dispute that there is no trademark consent agreement between the parties; no agreement provisions designed to preclude confusion; no assignment of any mark, application, registration or good will; and no laches or estoppel attributable to EGM.

d. The extent to which the applicant may exclude others (*DuPont* factor #11): The record does not indicate that Applicant has any legal right to exclude others from using the applied-for mark in question.

e. The extent of potential confusion (*de minimis* or substantial) (*DuPont* factor #12): Here, the extent of potential confusion is substantial for the reasons discussed above, including that CYBERHERO LEAGUE is an established, distinctive mark; that the challenged mark incorporates the dominant portion of the mark; that both marks target the same type of consumers; that both are used for related goods and services; and that the CYBERHERO family of marks are used for multiple goods and services, thus allowing for a reasonable assumption that the mark may have been expanded to include travel accommodation for explorers.

Therefore, *DuPont* factors 9 through 12 weigh in favor of finding likelihood of confusion.

At bottom, all of the *DuPont* factors are either neutral or weigh in EGM's favor, thus, reinforcing the evidence in the record and EGM's assessment that Applicant's CYBERHERO ADVENTURES will

undoubtedly cause confusion with EGM's CYBERHERO LEAGUE and CYBERHERO marks.


Accordingly, EGM's opposition should be sustained and Applicant's applied-for mark should be rejected.

VI. CONCLUSION

Based on the foregoing reasons and evidence of record, EGM respectfully requests that the Board sustain its opposition and refuse registration of the '305 Application for the mark CYBERHERO ADVENTURES DEFENDERS OF THE DIGITAL UNIVERSE on the basis that the applied-for mark is likely to cause confusion with EGM's CYBERHERO LEAGUE and CYBERHERO marks. EGM further respectfully requests the Board dismiss the opposition of the '133 Application for the mark CYBERHERO.

Respectfully submitted,

WRIGHT LINDSEY & JENNINGS LLP



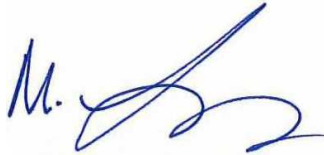
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I hereby certify that on November 17, 2021, copies of this paper are being served upon the following by email:

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